Office-Supreme Court, U.S.
FILED
JUL 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1848

In the Supreme Court of the United States

OCTOBER TERM, 1980

LEROY LOGAN, ET AL., PETITIONERS

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Osage Tribal Council has the authority to participate, on behalf of the Tribe, in certain federal programs, and to engage in certain other activities unrelated to the management of the Osage mineral estate.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Ball v. *James*, No. 79-1740 (Apr. 29, 1981)	9
Duke Power Co. v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59	7
Linda R.S. v. *Richard D.*, 410 U.S. 614	7
Reynolds v. *Sims*, 377 U.S. 533	4, 8, 9
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49	7
Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26	7
Talton v. *Mayes*, 163 U.S. 376	7
United States v. *Mason*, 412 U.S. 391	2
Warth v. *Seldin*, 422 U.S. 490	7

Constitution, statute, regulations and rules:

United States Constitution:	
Fourteenth Amendment, Equal Protection Clause	8
Osage Allotment Act, ch. 3572, 34 Stat. 539	2, 3, 4, 5, 6, 7
34 Stat. 540-543	2
34 Stat. 543-544	2
34 Stat. 544	2
34 Stat. 545	2
25 C.F.R.:	
Section 73.1 *et seq.*	2
Section 73.21	2
Fed. R. Civ. P.:	
Rule 59	6
Rule 59(e)	4

Miscellaneous:

H.R. Rep. No. 92-963, 92d Cong., 2d Sess. (1972)	2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-45 to A-53) is reported at 640 F.2d 269. The opinion of the district court (Pet. App. A-1 to A-44) is reported at 457 F. Supp. 1318.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1981. The petition for a writ of certiorari was filed on May 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Osage Allotment Act, ch. 3572, 34 Stat. 539, established the Osage Tribal Council, an eight-member body. 34 Stat. 545. The Act also directed that a roll be made of members of the Tribe. The Osage land was divided among the enrolled members (34 Stat. 540-543); the minerals found on the land were placed in trust (34 Stat. 543-544). Each enrolled member was given what is now called a "headright," the right to an equal share of the income from the mineral estate. 34 Stat. 544; see *United States* v. *Mason*, 412 U.S. 391, 393 (1973).

By regulation, a headright entitles the holder to one vote in elections for the Tribal Council. 25 C.F.R. 73.1 *et seq.* The headrights have passed by inheritance, however; thus some members of the Tribe have fractional headrights and others have multiple headrights (see H.R. Rep. No. 92-963, 92d Cong., 2d Sess. 9 (1972)). As a result, fractional or multiple votes are cast in Tribal Council elections. 25 C.F.R. 73.21. Some persons who claim Osage ancestry have no headrights.

2. Petitioners are seven Osage Indians, each of whom owns at least one full headright. They brought this action, which was transferred to the United States District Court for the Northern District of Oklahoma,[1] against the Secretary of the Interior and the Commissioner of Indian Affairs. The Osage Tribal Council was subsequently joined as a defendant. Petitioners alleged that the Tribal Council had

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[1] Petitioners originally sued in the United States District Court for the District of Columbia, which transferred the case to the United States District Court for the Northern District of Oklahoma. That court ordered the Osage Tribal Council joined as a defendant (Pet. App. A-2).

authority to act only in certain specific areas, principally concerned with the management of the mineral estate, defined by the Osage Allotment Act (Pet. App. A-1 to A-4). They claimed that the Tribal Council had exceeded its authority by participating in federal housing, employment, and economic development programs. They further asserted that the federal respondents approved the Tribal Council's actions and cooperated in them, and recognized the Osage Tribal Council as a "general government and not as an entity limited to mineral estate management" (Complaint at 6). As a result, petitioners said, funds that were part of the mineral trust were expended unlawfully, with the federal respondents' approval (Pet. App. A-3 to A-4).

After the parties stipulated that no material facts were in dispute (Pet. App. A-4), the district court granted in part and denied in part petitioners' motion for summary judgment. It held that the Osage Tribal Council was not limited to exercising the specific powers identified by petitioners (Pet. App. A-39, A-42) but could function as a "general governing body" (Pet. App. A-39). It reached this conclusion partly on the basis of the language of the Osage Allotment Act (Pet. App. A-26, A-27). Principally, however, the district court reasoned that the Act merely continued in existence the Tribal Council which was established, and granted general governmental powers, by the Osage Constitution of 1881 (see Pet. App. A-12 to A-13, A-16 to A-18, A-27 to A-30, A-37 to A-39). The district court held that the enumeration of specific powers in the Osage Allotment Act was intended only to supplement the Council's general powers under the 1881 Constitution (Pet. App. A-28).

The district court agreed with petitioners, however, that the Council could spend trust funds only on "activities * * * []related to the management of the Osage mineral estate" (Pet. App. A-40) and on those other functions explicitly enumerated in the Osage Allotment Act and other statutes. "[T]he use of Osage trust funds for purposes not specifically authorized by Congress is clearly improper" (Pet. App. A-41).

Petitioners then filed with the district court a "Motion to Vacate Judgment," apparently under Fed. R. Civ. P. 59(e). In this motion, petitioners asserted that the district court's ruling raised questions about the constitutionality of the Osage Allotment Act; citing *Reynolds* v. *Sims*, 377 U.S. 533 (1964), petitioners argued that if the Tribal Council exercised general government powers it could not constitutionally be elected by a system which excluded many who claimed to be Osage and weighted the votes of others according to their headrights. Petitioners' motion also contended that the district court's "revitaliz[ing] the 1881 Osage [C]onstitution[]" was a "surprise" and that the district court should maintain jurisdiction over the case while the Secretary of the Interior developed a plan to take account of this ruling (Motion to Vacate Judgment at 1). The district court denied the motion (Pet. App. A-43 to A-44), saying that "[t]he constitutionality of the Osage Allotment Act was never an issue before this Court, and to grant the relief requested by [petitioners] in their motion would be to expand the scope of this case far beyond that within which it has proceeded since its inception" (Pet. App. A-43).

3. Petitioners appealed from the denial of the motion. The court of appeals affirmed what it described

as the district court's holding that "the funds derived from the mineral estate" could be used "only for the benefit of the owners of headrights and not for the benefit of the Tribe generally or for non-owners of headrights" (Pet. App. A-47, A-53).

The court also held that the Osage Allotment Act gave the Tribal Council "the authority to cause the Tribe to participate in the various programs challenged in this action" (Pet. App. A-53). In reaching this conclusion the court of appeals said that it was not relying on the 1881 Constitution; it ruled that "[t]he validity of the 1881 Constitution, whether any elements remain, or whatever its status, thus stand as issues not adjudicated in this action" (Pet. App. A-52). Instead, the court of appeals relied on the terms of the statutes. It noted that the Osage Allotment Act "in no way limited the authority of the officers * * * in mineral administration or any other specific function" and pointed out that the titles used in the Act for tribal officials and governing bodies suggested that they were comparable to other general tribal governments (Pet. App. A-49). The court also noted that an amendment to the Osage Allotment Act enacted in 1929 referred to the Council as the "tribal government" (Pet. App. A-49 to A-50).

The court of appeals also held that the district court acted properly in refusing to consider the constitutional issue raised in petitioner's motion because that issue was not raised by the pleadings and not addressed by the parties (Pet. App. A-47 to A-48). In addition, the court said, since petitioners were headright owners, they could not claim that their voting rights were infringed (Pet. App. A-51).

ARGUMENT

1. Petitioners contend that the courts below erred in construing the Osage Allotment Act and related legislation to grant "general governmental powers" (Pet. 22) to the Tribal Council. But petitioners have not explained how this aspect of the decisions below injures them. Petitioners' complaint may fairly be read to allege that the Council spends, with the federal respondents' permission, money from the mineral trust that should be paid to the benefit of petitioners as headright holders. But both courts below held that such expenditures are improper, and the federal respondents do not seek review of this holding. Petitioners do not identify, in the complaint or in the petition, any other way in which the Council's exercise of "general governmental powers" injures them, and none is apparent.

2. Moreover, petitioners have not shown that the court of appeals' interpretation of the Osage Allotment Act is incorrect. Petitioners' sole argument is that the courts below should not have construed the Act as a grant of general governmental power because this construction raises serious constitutional questions.[2] But the general rule is that a tribal gov-

[2] There are suggestions in the petition (Pet. 10-13, 26 & n.27) that petitioners intend to challenge the court of appeals' interpretation on other grounds. But the petition presents no question fairly suggesting any contention other than that the court of appeals' interpretation is incorrect because it raises constitutional problems. See Pet. i. Moreover, petitioners appealed not from the district court's judgment but from its order denying their Rule 59 motion. See Pet. 17; Brief for the Appellants at 2. The only issues presented in that motion pertained to the federal constitutional ques-

ernment, in its dealings with members of the tribe, is not prohibited from taking actions that would violate the Constitution if done by a state or the federal government. See *Talton* v. *Mayes*, 163 U.S. 376, 384 (1896); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 & n.7 (1978) (citing cases). Thus, the Osage Tribal Council might exercise general govern-

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tions raised by the district court's decision and the district court's reliance on the Osage Constitution of 1881. The latter issue is plainly not before this Court.

Petitioners' argument that the lower courts' interpretation of the Osage Allotment Act raises serious constitutional problems is distinct from a straightforward assertion that the Act is unconstitutional, an assertion that is made in petitioners' postjudgment motion. But as the district court (Pet. App. A-43) and the court of appeals (Pet. App. A-48) correctly noted, the complaint makes no attack on the constitutionality of the voting scheme. Moreover, petitioners probably do not have standing to make such an attack. Petitioners assert (Pet. 24) that at least one of their number has only one headright, and therefore his vote is counted less than that of Osage who hold more than one headright. But petitioners acknowledge (Pet. 25) that many Osage have fractional shares or no shares; each petitioner has at least one share (Pet. 14). Petitioners appear to contend that if the Tribal Council exercises general governmental powers, each Osage must be allowed an equal vote. See Pet. 22-25. It seems likely, then, that if petitioners' constitutional attack succeeded, each of them would receive less, not more, of a voice in the election of the Tribal Council. Thus petitioners have failed to show that they are injured by the constitutional defect (see *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)) or that the "exercise of the Court's remedial powers would redress the claimed injuries" (*Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978); see *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 618 (1973)). At the very least, these issues of standing should have been litigated below; they were not because petitioners did not properly raise their constitutional claim.

mental powers even though it is elected by a system of weighted voting that could not, under the Equal Protection Clause of the Fourteenth Amendment and *Reynolds* v. *Sims*, *supra*, elect a state or local unit of general government. Congress might, therefore, authorize the Council to exercise general governmental powers without violating the Constitution.

In any event, petitioners' complaint did not challenge "a system of general government" (Pet. 19) or the exercise of "general governmental powers" (Pet. 22). It alleged (Complaint at 5) that the Tribal Council "has purported to exercise governmental authority on behalf of all Osage Indians pertaining to the following matters" and then listed seven specific areas, generally concerned with participation in various federal programs.[3] Accordingly, the issue before

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[3] The areas were (Complaint at 5-6):

(a) Receipt, administration, and expenditure of revenue sharing funds pursuant to 31 U.S.C. § 1221, *et seq.* * * *;

(b) Receipt, use, allocation and disposition of benefits of the Special Employment Assistance Program, 42 U.S.C. § 4871, *et seq.*;

(c) Fostering and encouraging tribal industrial development;

(d) Operation of Economic Development projects pursuant to 42 U.S.C. § 3161(a)(3);

(e) Acting as prime sponsor and receiving and expending funds under 42 U.S.C. §§ 2738(b), 2739, 2740;

(f) Consultation with the Department of the Interior and Bureau of Indian Affairs regarding the distribution and expenditure of $1,000,000 of education and socioeconomic funds set aside for the entire Osage Tribe of Indians of Oklahoma by the Act of October 27, 1972, Public Law 92-586, 86 Stat. 1295;

(g) Establishment of an Indian Housing Authority to qualify to receive monies from the Department of Housing and Development for the construction and maintenance of housing.

the lower courts was whether the Tribal Council had authority to participate in these programs. See Pet. App. A-53. Even assuming the doctrine of *Reynolds* v. *Sims* applies to Indian governments, only a very limited question is presented: whether the Council's exercise of the power to participate in federal programs has a "disproportionate relationship * * * to the specific class of people" who hold more heavily weighted votes. See *Ball* v. *James*, No. 79-1740 (Apr. 29, 1981), slip op. 15. The effects of such participation on various classes of Osage Indians were unexplored below, presumably because petitioners did not show how it has any effect on them at all (see page 6, *supra*). Plainly, the issue is not appropriate for decision on the present record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1981

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